

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | | |
|-------------------------|---|--------------------------------|
| DERRICK DEWAYNE FISHER, |) | 1:05cv0138 AWI DLB HC |
| |) | |
| |) | |
| Petitioner, |) | FINDINGS AND RECOMMENDATION |
| |) | REGARDING AMENDED PETITION FOR |
| v. |) | WRIT OF HABEAS CORPUS |
| |) | |
| A.P. KANE, |) | (Document 12) |
| |) | |
| |) | |
| Respondent. |) | |

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY¹

On October 30, 2001, in the Tulare County Superior Court, a jury convicted Petitioner of assault by means likely to cause great bodily injury, in violation of California Penal Code section 243(d). In a bifurcated court trial, Petitioner was found to have a prior strike conviction and two prior prison terms. He was sentenced to a total term of 10 years imprisonment.

Petitioner's conviction and sentence were upheld by the Fifth District Court of Appeal on February 11, 2003.

¹ This information is derived from Petitioner's amended petition for writ of habeas corpus and Respondent's answer to the petition.

1 Petitioner filed a petition for review in the California Supreme Court on March 14, 2003.
2 The petition was denied on April 16, 2003.

3 On October 23, 2003, Petitioner filed a petition for writ of habeas corpus in the Tulare
4 County Superior Court. The petition was denied on October 28, 2003.

5 Petitioner next filed two petitions for writ of habeas corpus in the Fifth District Court of
6 Appeal. The petitions were denied on December 4, 2003, and January 22, 2004.

7 On February 2, 2004, Petitioner filed a petition for writ of habeas corpus in the California
8 Supreme Court. The petition was denied on December 1, 2004.

9 Petitioner filed the instant petition on January 21, 2005. On March 23, 2005, pursuant to
10 Court order, Petitioner filed an amended petition. He alleges the following grounds for relief: (1)
11 ineffective assistance of counsel based on counsel's failure to motion the court to have his prior
12 1988 robbery conviction stricken; (2) denial of due process and equal protection based on
13 insufficient evidence to prove he was the subject of documentary evidence; (3) ineffective
14 assistance of counsel based on counsel's advice to admit the 1988 robbery conviction; (4) trial
15 court error based on court's failure to confirm waiver of rights in connection with 1990 and 1994
16 priors; (5) trial court error based on the court allowing the prosecution to add a 1994 possession
17 charge to the information after the jury was discharged; (6) trial court error based on allowing the
18 testimony of Sandra Fisher as evidence of 1988 robbery conviction; and (7) trial court error based
19 on admission of documentary evidence without foundation to prove prior conviction.

20 STATEMENT OF FACTS²

21 **Facts Giving Rise to the Current Charge**

22 At the time of the trial, Petitioner had lived with Sandra Fisher (Sandra) for 16 years and
23 they had been married for five years. Together, they had four children. Sandra had three
24 children by a prior relationship. Andrea Porter, the eldest of Petitioner's stepchildren, was 21
25 years old at the time of the events giving rise to the charges against Petitioner. Porter was the
26 owner of record of a Lincoln Continental, which had been purchased by Porter's mother, Sandra.

27
28
² This statement of facts is taken from the February 11, 2003, opinion of the Fifth District Court of Appeal.

1 Apparently, Porter's name was on the pink slip because Sandra did not have a driver's license
2 and was not insurable.

3 On the evening of July 2, 2001, Petitioner took the keys to the Lincoln from Sandra's
4 purse while she was asleep. When Porter discovered the car was gone, she got in another car and
5 drove around Tulare in an unsuccessful effort to locate the Lincoln. The following morning,
6 Porter located the Lincoln near a city park. Petitioner was standing near the car talking to
7 someone Porter identified as her "auntie." Porter confronted Petitioner and demanded he return
8 the keys to the car. Petitioner got in the car and started driving off. Porter leaned in the window
9 and tried to extract the keys from the ignition. Porter testified that Petitioner was hitting her in
10 the arm and she tried to bite him. Eventually, Petitioner drove off in the Lincoln and Porter went
11 home and called the police. About the time the police officer responded to the call, Petitioner
12 drove up to the house in the Lincoln.

13 After some discussion between the officer, Petitioner, Porter and Sandra, it was decided
14 Sandra would drive Petitioner to the bus station where he would leave. Porter decided she would
15 follow in a different car. On the way to the bus station, the cars stopped at a gas station and
16 convenience store. Porter testified that while they were at the gas station, Petitioner got out of
17 the car in which he was riding and confronted Porter. After some angry words, Porter testified
18 that Petitioner hit her in the face. Sandra testified that once Porter was knocked to the ground,
19 Petitioner got on top of her and continued hitting her in the face and head. Porter testified her
20 eye was swollen shut from the beating and she suffered lacerations that required stitches to close.
21 The gas station attendant witnesses the altercation and called the police.

22 The defense portrayed Porter as a violent, knife-wielding young woman who was given to
23 confrontation and was often out of control. Petitioner testified Porter was angry all the time and
24 always carried a knife. He described three occasions where she had confronted him while armed
25 with a knife. He stated that Porter had hit him on the face during the incident in the car by the
26 park. He also testified that Porter got in his face at the gas station and hit him in the face first.
27 Petitioner testified that his actions at the gas station were basically acts of self-defense.
28

Facts Pertaining to 1988 Robbery Conviction

In 1988, Petitioner pled guilty to charges of second degree robbery and unlawfully taking a vehicle. He entered his guilty plea at the time of his arraignment after refusing assistance of counsel. The record indicates, and Petitioner generally concedes, that the trial court in the 1988 proceedings adequately advised him of his constitutional rights to representation by counsel as well as other rights as enumerated in and required by In re Tahl (1969) 1 Cal.3d 122, 81 Cal.Rptr. 577, 460 P.2d 499 [footnote omitted], and obtained an explicit waiver of those rights. The trial court in that proceeding did not specifically inquire into Petitioner's then-current mental status.

During the priors phase of the trial on November 1, 2001, an abstract of judgment was introduced that showed that Petitioner suffered a conviction for second degree robbery in 1988. Petitioner objected to the admission of the abstract of judgment and noticed his intent to challenge the 1988 conviction on the grounds of alleged failure of the trial court to conduct an adequate hearing during that proceeding pursuant to Faretta v. California (1975) 422 U.S. 806, 835, 45 L.Ed.2d 562, 95 S.Ct. 2525 (Faretta). Specifically, Petitioner contended that the trial court failed to make an adequate inquiry into his mental capacity to waive his right to assistance of counsel.

During the hearing on the motion to strike the allegation of the strike prior on November 8, 2001, Petitioner testified that, at the time he entered his plea of guilty in 1988, he was undergoing withdrawal from cocaine and PCP. Petitioner stated that he pled guilty at the time of the arraignment in the hope and belief that he would be released so he could acquire more drugs. Petitioner testified that he did not understand the role of the district attorney and did not comprehend the role of a defense attorney whose assistance he refused. Petitioner also testified that he had been committed to a mental institution at some time prior to his conviction and had been released from treatment in the year prior to his conviction.

The trial court reviewed the transcript of the 1988 conviction and noted that Petitioner was thoroughly apprised of his rights to an attorney and to a jury trial. The court also noted that in the 13 years since the conviction, there had never been an appeal of the judgment or a petition

1 for writ of habeas corpus. At the sentencing hearing on December 12, 2001, the trial court also
 2 declined to exercise its discretion under Romero to strike the allegation of the prior strike.

3 DISCUSSION

4 A. Jurisdiction

5 Relief by way of a petition for writ of habeas corpus extends to a person in custody
 6 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
 7 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,
 8 529 U.S. 362, 375, 120 S.Ct. 1495, 1504, n.7 (2000). Petitioner asserts that he suffered
 9 violations of his rights as guaranteed by the U.S. Constitution. The challenged conviction arises
 10 out of the Tulare County Superior Court, which is located within the jurisdiction of this Court.
 11 28 U.S.C. § 2254(a); 2241(d).

12 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
 13 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
 14 enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S.
 15 1008, 118 S.Ct. 586 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting
 16 Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct.
 17 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059
 18 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant
 19 petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

20 B. Standard of Review

21 This Court may entertain a petition for writ of habeas corpus “in behalf of a person in
 22 custody pursuant to the judgment of a State court only on the ground that he is in custody in
 23 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

24 The AEDPA altered the standard of review that a federal habeas court must apply with
 25 respect to a state prisoner's claim that was adjudicated on the merits in state court. Williams v.
 26 Taylor, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus
 27 will not be granted unless the adjudication of the claim “resulted in a decision that was contrary
 28 to, or involved an unreasonable application of, clearly established Federal law, as determined by

the Supreme Court of the United States;” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.” 28 U.S.C. § 2254(d); Lockyer v. Andrade, 123 S.Ct. 1166 (2003) (disapproving of the Ninth Circuit’s approach in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000)); Williams v. Taylor, 120 S.Ct. 1495, 1523 (2000). “A federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” Lockyer, at 1175 (citations omitted). “Rather, that application must be objectively unreasonable.” Id. (citations omitted).

While habeas corpus relief is an important instrument to assure that individuals are constitutionally protected, Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983); Harris v. Nelson, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal conviction is the primary method for a petitioner to challenge that conviction. Brecht v. Abrahamson, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual determinations must be presumed correct, and the federal court must accept all factual findings made by the state court unless the petitioner can rebut “the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995); Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457 (1995); Langford v. Day, 110 F.3d 1380, 1388 (9th Cir. 1997).

C. Ineffective Assistance of Counsel

Plaintiff argues that his trial counsel was ineffective for failing to motion the court to have his 1988 robbery conviction for lack of sufficient evidence. He contends that the evidence of identity was insufficient to prove he actually committed the prior because there was no evidence, such as photographs or fingerprints, to establish that Petitioner was the Derrick Dewayne Fisher that was the subject of the documentary evidence.³

³ To prove that Petitioner was convicted in 1988 of second degree robbery and unlawful taking of a vehicle, the prosecution presented the following evidence: (1) a copy of the Reporter’s Transcript from the Municipal Court of Kern County, case no. 47666; (2) a copy of an abstract of judgment dated August 1, 1989, which reflects that on February 25, 1988, in case no. 35590, Derrick Dewayne Fisher, in propria persona, pled guilty to one count of second degree robbery and unlawful taking of a vehicle; and (3) a Kern County Superior Court minute order dated February 25, 1988. RT 416-417; CT 191-208.

1 Ineffective assistance of counsel is based on the Sixth Amendment right to counsel,
2 which exists “in order to protect the fundamental right to a fair trial.” Strickland v. Washington,
3 466 U.S. 668, 684 (1984). A claim for ineffective assistance must meet the two-part test
4 advanced by the Strickland court. First, petitioner must show that counsel “made errors so
5 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
6 Amendment. Second, [petitioner] must show that the deficient performance prejudiced the
7 defense. Id. at 687. This two-part standard also applies to challenges to guilty pleas based in
8 ineffective assistance of counsel. In the context of a guilty plea, a petitioner must show that (1)
9 his counsel failed to provide reasonable competent advice, and that (2) there is a reasonable
10 probability that, but for counsel's errors, he would not have pleaded guilty and would have
11 insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

12 As Petitioner points out in his argument, counsel argued at the hearing on the prior
13 conviction that there was insufficient evidence to prove that Petitioner was charged and
14 ultimately convicted of the offense. RT 432-433. Counsel also argued that Plaintiff was
15 unrepresented during the 1988 hearing and did not knowingly waive his rights. RT 432. The
16 court gave the parties a week to present evidence and argument on the issue of whether the prior
17 convictions were true. RT 433.

18 When the proceedings continued, Petitioner took the stand and admitted that in 1988, he
19 pled guilty to robbery and grand theft auto. RT 436-437. He further testified that he was not
20 represented by counsel and that he wasn’t “in the right frame of mind” when he pled guilty
21 because he was high on PCP and crack at the time of his plea and believed that he would be
22 released if he pled guilty. RT 437-438. Pursuant to People v. Superior Court (Romero), 13
23 Cal.4th 497 (1996), Petitioner’s counsel made a motion to strike the prior on the ground that it
24 would be in the interests of justice given that Petitioner did not have an attorney and testified that
25 he was high at the time of his plea. RT 447. The court denied the motion, having determined
26

27 The prosecution also presented the evidence of Sandra Fisher, Petitioner’s wife. RT 417-429. She testified
28 that she attended the trial and visited Petitioner in prison in 1988 and discussed the robbery. RT 419-420. She
further testified that Petitioner told her he was going to prison because “they had robbed Tommy’s Liquor in
Bakersfield and tried to steal a car.” RT 420.

1 that there was no deprivation of constitutional rights.⁴ RT 448. The court further determined
 2 that the evidence showed beyond a reasonable doubt that Petitioner suffered the 1988 strike
 3 conviction for robbery. RT 449.

4 Counsel chose to move forward with the argument that the 1988 plea was invalid and in
 5 denying this argument, the court found that the evidence was sufficient to establish that Petitioner
 6 suffered the 1988 prior. Indirectly, then, counsel made this argument and it was rejected. In any
 7 event, given the trial court's finding of sufficient evidence, and especially Petitioner's admission,
 8 it would have been fruitless for counsel to explicitly move to strike the prior based on sufficiency
 9 of the evidence. Counsel's failure to raise meritless legal argument does not constitute
 10 ineffective assistance of counsel. See Shah v. United States, 878 F.2d 1156, 1162 (9th Cir. 1989).
 11 The state courts' denial of this claim was neither contrary to, or an unreasonable application of,
 12 clearly established Supreme Court precedent.

13 D. Sufficiency of the Evidence

14 In a related argument, Petitioner contends that there was insufficient evidence to prove,
 15 beyond a reasonable doubt, that he was the subject of the documentary evidence submitted to
 16 establish his 1988 robbery conviction. As a result, Petitioner submits that this Court must strike
 17 the four additional years that was added to his sentence on the basis of the 1988 conviction.

18 The law on insufficiency of the evidence claim is clearly established. The United States
 19 Supreme Court has held that when reviewing an insufficiency of the evidence claim on habeas, a
 20 federal court must determine whether, viewing the evidence and the inferences to be drawn from
 21 it in the light most favorable to the prosecution, any rational trier of fact could find the essential
 22 elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).
 23 Sufficiency claims are judged by the elements defined by state law. Id. at 324, n.16.

24 As previously set forth, the prosecution submitted the following evidence in support of
 25 Petitioner's 1988 robbery conviction: (1) a copy of the Reporter's Transcript from the Municipal
 26

27 ⁴ The trial court found that the judge "thoroughly went through Mr. Fisher's Boykin-Tahl rights" and that
 28 Petitioner made a knowing and voluntary waiver of those rights. RT 448. The court further explained that the judge
 asked more than once if Petitioner wanted an attorney and Petitioner declined. RT 448. Petitioner did not request an
 attorney after the plea nor did he appeal the judgment or sentence. RT 448-449.

1 Court of Kern County, case no. 47666; (2) a copy of an abstract of judgment dated August 1,
2 1989, which reflects that on February 25, 1988, in case no. 35590, Derrick Dewayne Fisher, in
3 propria persona, pled guilty to one count of second degree robbery and unlawful taking of a
4 vehicle; and (3) a Kern County Superior Court minute order dated February 25, 1988. RT 416-
5 417; CT 191-208. The prosecution also presented the evidence of Sandra Fisher, Petitioner's
6 wife. RT 417-429. She testified that she attended the trial and visited Petitioner in prison in
7 1988 and discussed the robbery. RT 419-420. She further testified that Petitioner told her he
8 was going to prison because "they had robbed Tommy's Liquor in Bakersfield and tried to steal a
9 car." RT 420.

10 In addition to this evidence, Petitioner took the stand and testified that he pled guilty to
11 the robbery charge in 1988. See Blackridge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn
12 declarations in open court carry a strong presumption of verity.").

13 In light of this evidence, Petitioner's argument that the evidence was insufficient to prove
14 his 1988 robbery conviction is meritless. A rational trier of fact could have found, beyond a
15 reasonable doubt, that Petitioner suffered the 1988 robbery conviction. The state courts'
16 determination of this issue was not contrary to, or an unreasonable application of, clearly
17 established Supreme Court precedent.

18 E. Ineffective Assistance of Counsel

19 _____ Petitioner contends that his trial counsel was ineffective for advising him to admit the
20 1988 prior conviction where there was insufficient evidence to prove his prior.

21 Given the Court's above findings, this argument is without merit. First, the Court has
22 determined that there was sufficient evidence to prove Petitioner's 1988 prior beyond a
23 reasonable doubt, making any argument by counsel to the contrary likely fruitless. See Shah v.
24 United States, 878 F.2d 1156, 1162 (9th Cir. 1989). Second, counsel's decision to forego the
25 sufficiency of the evidence claim in favor of the Romero claim was a reasonable tactical
26 decision. Counsel could have reasonably concluded that the evidence was likely sufficient to
27 prove the 1988 prior and that a challenge based on the validity of the plea may have been more
28 successful. By having Petitioner admit the prior, counsel was able to elicit the details of the prior

in support of his argument that the plea was invalid. United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981) (difference in opinion as to trial tactics does not constitute denial of effective assistance). The state courts' determination of this issue was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

F. Trial Court Error Based on Failure to Inquire Into Validity of Prior Convictions

Petitioner argues that the trial court erred by failing to confirm Petitioner's waiver of his right to a jury trial, right to confrontation and right against self-incrimination during his guilty pleas in his 1990 and 1994 convictions. He further argues that his 1990 and 1994 pleas were invalid and therefore could not be used to enhance his current sentence.

In Lackawanna County District Attorney v. Coss, 532 U.S. 394 (2001), the United States Supreme Court addressed whether: (1) 28 U.S.C. § 2254 provides a remedy when a current sentence was enhanced based on an allegedly unconstitutional prior conviction for which the sentence has expired; and (2) the extent to which the prior expired conviction may be challenged in attack on the current sentence which it was used to enhance. Pointing to its prior decision Daniels v. United States, 532 U.S. 374 (2001), the Court explained:

We held there [Daniels] that "[i]f . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant may not collaterally attack his prior conviction through a motion under § 2255." *Ante*, at 8. We now extend this holding to cover § 2254 petitions directed at enhanced state sentences. Lackawanna, 532 U.S. at 402.

The Court reiterated its holding that "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. . . . If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Lackawanna*, 532 U.S. 394 at 403-404.

Therefore, because Petitioner's 1990 and 1994 convictions are no longer open to direct or collateral attacks, Petitioner may not use the instant section 2254 habeas petition as an indirect

challenge. To the extent Petitioner claims that the trial court erred in not delving into the constitutionality of the prior conviction, where there was no challenge thereto, his claim fails as the trial court has no such duty. The state courts' determination of this issue was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

G. Trial Court Error Based on Allowing Prosecution to Amend Information

Next, Petitioner contends that the trial court acted in excess of its jurisdiction by allowing the prosecution to amend the information after the jury was dismissed.

Petitioner waived his right to a jury trial on the prior convictions on October 29, 2001. CT 81. On November 1, 2001, after the jury trial on the substantive offenses, the prosecutor moved to amend one of the dates charged on a prior offense. RT 416-417. The charging document originally alleged that Petitioner suffered a prior conviction for a violation of California Health and Safety Code section 11350 on May 4, 1994. CT 60, RT 416-417. The prosecutor moved to amend the date to April 8, 1994. RT 417. Counsel objected to the amendment as late, but the trial court allowed it. RT 417. Petitioner argues that he did not waive or forfeit his right to have the jury determine the truth of the 1994 prior conviction.

Even assuming that Petitioner's allegation rises to the level of a federal claim, his claim fails. See eg., Scott v. Pliler, 2002 WL 1034075 (N.D. 2002). Petitioner is correct that, pursuant to California Penal Code section 1025(b), a prior conviction must be tried by the same jury that tried the issue of guilt. However, this section also provides that the court will try the prior conviction if the defendant waives the jury. Here, Petitioner *waived* a jury trial on the truth of his prior convictions. CT 81. While the prosecution's amendment occurred after Petitioner's waiver, the amendment does not invalidate the waiver, especially where the amendment merely changed the date of the previously alleged 1994 prior conviction. Petitioner has failed to demonstrate that the state courts' determination of the issue was contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

H. Evidentiary Error

Petitioner argues that the trial court abused its discretion by allowing the prosecution to present the inadmissible hearsay evidence of Sandra Fisher in proving Petitioner's 1988 robbery

1 conviction. Petitioner contends this was prejudicial because the testimony was used to relitigate
2 the circumstances of Petitioner's prior convictions. He further contends that other than this
3 improper evidence, there was no evidence presented to connect Petitioner to the documents
4 offered in support of the 1988 prior.

5 Again, Petitioner fails to allege a violation of a federal right and only cites California
6 statutes and cases in support of his argument. He cites only California law in support of his
7 argument that the trier of fact may not look outside the record of conviction in determining the
8 truth of the prior conviction allegation. Generally, the admissibility of evidence is a matter of
9 state law, and is not reviewable in a federal habeas corpus proceeding. Estelle v. McGuire, 502
10 U.S. 62, 68 (1991); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985). Petitioner
11 therefore fails to state a claim for relief. 28 U.S.C. § 2254(a).

12 To the extent that Petitioner's claim can be construed as a federal claim, his claim fails.
13 Habeas relief for the admission of prejudicial evidence will be granted only if the admission was
14 fundamentally unfair and resulted in a denial of due process. Estelle, 112 S.Ct. at 482; Pulley v.
15 Harris, 465 U.S. 37, 41 (1984); Walters v. Maas, 45 F.3d 1355, 1357 (9th Cir. 1995); Jeffries v.
16 Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191, 114 S.Ct. 1294 (1994);
17 Gordon v. Duran, 895 F.2d 610, 613 (9th Cir.1990). Only if there are no permissible inferences
18 that the jury may draw from the evidence can its admission rise to the level of a due process
19 violation. Id. at 920.

20 As discussed above, Petitioner's claim involves an issue of state law- the scope of
21 admissible evidence in proving the truth of prior convictions pursuant to California Penal Code
22 section 667.5. The failure to comply with state rules of evidence alone is neither a necessary nor
23 a sufficient basis for granting federal habeas relief on due process grounds. Jammal v. Van de
24 Kamp, 926 F.2d 918, 919-920 (9th Cir. 1991).

25 Nor does Petitioner's claim establish a violation of due process. The testimony in
26 question was relevant to establish that he suffered a robbery conviction and had served a prison
27 term for it. This connection was a permissible inference to make from the testimony and
28 therefore does not rise to the level of a due process violation. The state courts' determination of

1 this issue was not contrary to, or an unreasonable application of, clearly established Supreme
2 Court precedent.

3 I. Section 969b Evidence

4 Finally, Petitioner argues that the trial court abused its discretion by permitting the
5 prosecution to offer certain documentation into evidence to prove the prior conviction
6 allegations. Petitioner points to the admission of an uncertified California Penal Code section
7 969b packet in support of his argument, and alleges that the prosecution failed to establish
8 foundational requirements for admission under section 969b. He contends that admission was
9 improper because there was no testimony regarding how the records were prepared.

10 Again, Petitioner claim is based on state law and he does not allege a violation of federal
11 law. Assuming Petitioner states a cognizable claim, his claim fails. He alleges that the trial court
12 committed error when it allowed certain evidence in violation of section 969b, which designates
13 the procedure to be used in allowing documentary evidence. This issue, however, is one of state
14 law, and as explained above, is not reviewable in a federal habeas corpus proceeding. Estelle,
15 502 U.S. at 68.

16 In any event, the failure to comply with state rules of evidence alone is neither a necessary
17 nor a sufficient basis for granting federal habeas relief on due process grounds. Jammal v. Van
18 de Kamp, 926 F.2d 918, 919-920 (9th Cir. 1991). Moreover, the trial court listened to
19 Petitioner's objections to People's exhibits 9, 10, 11, 12 and 13, as uncertified, but decided to
20 admit the documents. RT 431. This decision was an interpretation of state law and Petitioner
21 does not provide any evidence to suggest a violation of federal law. A federal habeas court has
22 no basis for disputing a state's interpretation of its own law. Clemons v. Mississippi, 494 U.S.
23 738, 739-40 (1990).

24 The state courts' determination of this issue was not contrary to, or an unreasonable
25 application of, clearly established Supreme Court precedent.

RECOMMENDATION

Accordingly, the Court RECOMMENDS that the amended petition for writ of habeas corpus be DENIED.

This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy of this Findings and Recommendation, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c)). The parties are advised that failure to file objections within the specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: January 6, 2006
3b142a

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE